> compliance with the requirements of section 271. Paper promises do not, and cannot, satisfy a BOC's burden of proof. In order to gain in-region, interLATA entry, a BOC must support its application with actual evidence demonstrating its present compliance with the statutory conditions for entry, instead of prospective evidence that is contingent on future behavior.[51]

Accordingly, the most probative evidence is actual commercial usage[52] that demonstrates that there is no "statistically significant difference" in the treatment of the wholesale and retail operations.[53]

In addition, the evidentiary support submitted by SBC must be the result of rigorous state review in order to merit significant weight by the Commission. "[W]e emphasize our strong preference for a record that contains data measuring a BOC's performance pursuant to state-adopted standards that were developed with input from the relevant carriers and that include clearly-defined guidelines and methodology."[54]

B. SBC Must Demonstrate Checklist Compliance For Every Market.

In order to comply with the requirements of section 271's competitive checklist, a BOC must demonstrate that it has "fully implemented the competitive checklist in subsection (c)(2)(B)."[55] Specifically, SWBT must demonstrate that it is offering interconnection and access to network elements on a nondiscriminatory basis, such that analogous functions the BOC provides to competitive carriers are provided in "substantially the same time and manner" as

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[51] *Ameritech Michigan 271 Order* ¶ 55; *BA-NY 271 Order* ¶ 37.

[52] *BA-NY 271 Order* ¶ 59.

[53] *BA-NY 271 Order* ¶ 59.

[54] *BA-NY 271 Order* ¶ 324.

[55] *BA-NY 271 Order* ¶ 18.

provided to itself.[56] For the functions for which there is no retail analogue, a BOC must demonstrate that competing carriers have a "meaningful opportunity to compete."[57]

The FCC has concluded that under § 271 "a BOC 'provides' a checklist item if it actually furnishes the item at rates and on terms and conditions that comply with the Act or, where no competitor is actually using the item, if the BOC makes the checklist item available as both a legal and a practical matter."[58] "[T]he mere fact that a BOC has 'offered' to provide checklist items will not suffice for a BOC petitioning for entry under Track A to establish checklist compliance."[59] A BOC must demonstrate a "concrete and specific legal obligation to furnish the item upon request pursuant to state-approved interconnection agreements that set forth prices and other terms and condition" *and* must show that it is "currently furnishing, or is ready to furnish, the checklist item in quantities that competitors may reasonably demand and at an acceptable level of quality."[60]

The Commission has expressly acknowledged that its judgement on a § 271 application seeks to ensure that granting interLATA authority will "promot[e] competition in local markets."[61] Further, in its *UNE Remand Order*, the Commission specifically noted that its unbundling requirements under section 251 were "designed to create incentives for both incumbent and competitive LECs to innovate and invest in technologies and services that will benefit consumers through increased choices of telecommunications services and lower

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[56] *BA-NY 271 Order* ¶ 44.

[57] *BA-NY 271 Order* ¶ 44.

[58] *Ameritech Michigan Order* ¶ 110.

[59] *Ameritech Michigan Order* ¶ 110.

[60] *BA-NY 271 Order* ¶ 52.

[61] *BA-NY 271 Order* ¶ 46.

prices."[62] More specifically, the Commission sought to establish unbundling rules "to facilitate the rapid and efficient deployment of all telecommunications services, including advanced services."[63]

C. Section 271 Applies to Advanced Services

There is no dispute that the 1996 Act and the requirements of sections 251, 252 and 271 apply to advanced services. "[T]he Act itself embraces advanced services. Congress made clear that the 1996 Act is technologically neutral and is designed to ensure competition in all telecommunications markets."[64] Further, the Commission has stated that "[t]he critical, market-opening provisions of section 251 are incorporated into these competitive checklist found in section 271"[65] and that Section 251(c) applies to advanced services.[66]

Moreover, the Commission has determined that application of § 271 to all telecommunications services serves the public interest and is consistent with the Commission's statutory obligation under § 706 of the Act to ensure the rapid deployment of advanced services. [67] Thus, when regional BOCs sought forbearance from § 271 for their advanced services, the Commission refused to grant them this exemption, stating that "such a determination could effectively eviscerate § 271 and circumvent the procompetitive incentives for opening the local market that Congress sought to achieve through that section of the Act."[68] Therefore, before the

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[62] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order, CC Docket No. 96-98 (rel. Nov. 5, 1999) ("*UNE Remand Order*") ¶ 5.

[63] *UNE Remand Order* ¶ 14.

[64] *Advanced Services Order* ¶ 11.

[65] *BA-NY 271 Order* ¶ 18 n.32

[66] *Advanced Services Order* ¶ 11; *In the Matter of Deployment of Wireline Service Offering Advanced Telecommunications Capability, et al.*, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-15, 98-78, 98-91 Order on Remand (rel. Dec. 23, 1999) (*706 Remand Order*) ¶¶ 9-12.

[67] Section 706, Pub. L. 104-104, Title VII, § 706, Feb. 8, 1996; *see Advanced Services Order* ¶ 1.

[68] *Advanced Services Order* ¶ 12.

Commission may find that a BOC has satisfied its market-opening responsibilities under § 271, it must affirmatively find that the BOC has met those obligations with respect to advanced services, not merely with respect to traditional circuit-switched offerings.

The time is ripe for the Commission to ensure that advanced services are not ignored as the only market opening incentive in the Act is removed. In the *BA-NY 271 Order*, the Commission was clear that future § 271 applicants would be held to a higher standard of proof with regard to advanced services and specifically xDSL performance. "Given our *statutory obligation* to encourage the deployment of advanced services and the critical importance of the provisioning of xDSL loops to development of the advanced services marketplace, we *emphasize our intention to examine this issue closely in the future*.[69] "[W]e reiterate that we do not expect the special circumstances that are present in this application to exist in future applications."[70] Yet, despite this express notice,[71] SBC seeks interLATA authority without "a separate and comprehensive showing with respect to the provision of xDSL-capable loops."[72]

D. SBC Behavior Impacting Advanced Services Is A Significant Part of 271 Review

DSL service providers are ripe targets for anticompetitive behavior because of the far-reaching, market-changing implications of DSL technologies.[73] Advanced services are new and exciting services that are particularly challenging to the BOC's monopoly foot-hold and thus, are an attractive target for BOC discrimination.[74] Moreover, "with a continuing shift from a circuit-switched to a packet-switched environment, . . . "any discrimination against these competitors

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[69] *BA-NY 271 Order* ¶ 330 (emphasis added).

[70] *BA-NY 271 Order* ¶ 336.

[71] *BA-NY 271 Order* ¶ 336.

[72] *BA-NY 271 Order* ¶ 330.

[73] *SBC/Ameritech Merger Order* ¶¶ 186-211.

likely will cause a significant setback to current and future efforts to encourage competition and innovation."[75] For these reasons, the Commission has determined that a BOC's performance of its advanced services obligations should receive heightened scrutiny.[76]

Given these Commission determinations, the concerns of DSL competitors cannot be lost or subsumed in an overall review of a BOC's compliance with Section 271. More specifically, it is not permissible for a BOC to show mediocre performance on DSL issues, and somehow make up for that performance by showing compliance with the checklist provisions for other service offerings. Indeed, as the Commission has indicated, advanced services should be subject to heightened and not diluted § 271 scrutiny.

II. SBC HAS NOT MET SECTION 271 REQUIREMENTS FOR CHECKLIST ITEM TWO FOR NONDISCRIMINATORY ACCESS TO OSS

Item two of the competitive checklist requires that SWBT provide "nondiscriminatory access to network elements in accordance with the requirements of sections 252(c)(3) and 252(d)(1) of the Act."[77] The nondiscriminatory provision of operations support systems ("OSS") is an "integral aspect[s] of the BOC's obligation to provide access to unbundled network elements ("UNEs") as required by checklist Item Two."[78] Further, the Commission has given

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[74] *SBC/Ameritech Merger Order* ¶ 210.

[75] *SBC/Ameritech Merger Order* ¶ 210.

[76] *SBC/Ameritech Merger Order* ¶ 210. The Commission was particularly concerned that "[i]ncumbent LEC discrimination against competitive providers of xDSL services has delayed competitive provision of these services and necessitated regulatory intervention. *Id.* ¶ 197.

[77] 47 U.S.C. § 271(c)(2)(B)(ii).

[78] *BA-NY 271 Order* ¶ 81; *see also UNE Remand Order* at ¶¶ 209-219; *Line Sharing Order* ¶ 61. "To ensure that all carriers are able to compete fairly for customers, the Commission has consistently emphasized that the incumbent LEC must give its competitors nondiscriminatory access to the functions of its operations support systems." *In the Matter of Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Louisiana*, Memorandum Opinion and Order, CC Docket No. 97-231 (rel. Feb. 4, 1998) ("*First Louisiana 271 Order*") ¶ 20.

particular scrutiny to OSS access because it inherently impacts the availability of all other checklist items.[79]

For xDSL, the Commission cannot conclude that SBC has satisfied its obligation under checklist Item Two. Despite SBC's assertions in its application, neither the current OSS nor proposed modifications to SBC's OSS will provide the capabilities necessary to fully support the ordering and provisioning of xDSL capable loops.[80] Further, SBC's testing of its OSS for xDSL provisioning was seriously deficient due to lack of volume and use of an associated entity to perform testing.

In this section, Rhythms discusses the extent to which SWBT's OSS functions for CLECs, and in particular data CLECs, are — or more accurately are not — operationally ready pursuant to the FCC's requirements. The FCC has made clear that SWBT must demonstrate that it is providing nondiscriminatory access to OSS capabilities, and that those OSS allow competitors to place orders "within substantially the same time and manner that the BOC provides to itself" and to "provide service to its customers in substantially the same time and manner that [the incumbent] provides to its own retail customers."[81]

OSS provides the essential gateway for CLECs to obtain crucial checklist items from SWBT and to provide service to customers in competition with SWBT. Absent effective and commercially ready OSS functions, SWBT cannot be found to have fully implemented the competitive checklist, regardless of the alleged availability of individual checklist items.

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[79] An "examination of a BOC's OSS performance is therefore integral to our determination of whether a BOC is offering *all* of the items contained in the competitive checklist." *BA-NY 271 Order* ¶ 84 n.202 (emphasis added).

[80] Lopez-Baros Aff/Attachment 1 ¶ 7.

[81] *First Louisiana* Order ¶ 23.

Indeed, the "most probative evidence that OSS functions are operationally ready is actual commercial usage."[82]

For DSL competitors in particular, this means obtaining necessary loop make-up information during the pre-ordering stage. The "incumbent LEC must provide the requesting carrier with nondiscriminatory access to the same detailed information about the loop that is available to the incumbent, so that the requesting carrier can make an independent judgment about whether the loop is capable of supporting the advanced services equipment the requesting carrier intends to install."[83]

As the Commission held, "[u]nder our nondiscrimination requirement, an incumbent LEC cannot limit access to loop make-up information to a

> green, yellow, or red indicator. Instead, the incumbent must provide access to the underlying loop qualification information contained in its engineering record, plant records and other back office systems so that requesting carrier can make their own judgment about whether those loops are suitable for the services the requesting carriers seek to offer.[84]

Further "to the extent that [ILEC] employees have access to the information in an electronic format, that same format should be made available to new entrants via an electronic interface."[85] Specifically, "under our existing rules, the relevant inquiry is not whether the retail arm of the incumbent has access to the underlying loop qualification information, but rather whether such information exists anywhere within the incumbents' back office and can be accessed by any of the incumbent LEC's personnel."[86] In the Rhythms arbitration it became

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[82] *BA-NY 271 Order* ¶ 89.

[83] *UNE Remand Order* ¶ 427.

[84] *UNE Remand Order* ¶ 428.

[85] *UNE Remand Order* ¶ 429

[86] *UNE Remand Order* ¶ 430.

clear that "the information carriers seek in electronic form is currently contained in an existing [SWBT] database that carriers cannot readily access."[87]

The FCC and the Texas Arbitrators have ordered ILECs, including SWBT, to give CLECs access to the underlying loop qualification information contained in its engineering record, plant records and other back office systems and databases, such as LFACS.[88]

A. SBC's Retail xDSL Operations Have Access to Loop Make-Up Information Not Available to CLECs

A critical component of SWBT's OSS is SBC's LFACS,[89] LEAD,[90] and TIRKS[91] databases that contain loop makeup information. Evidence in the Rhythms arbitration demonstrated that SWBT's outside plant engineers and loop assignment center personnel have regular access to these three databases.[92] Accordingly, to demonstrate that it has met its checklist obligations, SWBT must demonstrate that Rhythms and Covad have similar access.[93] SBC fails to meet Checklist Item 2 because it does not provide CLECs with access to the full range of loop make-up information available to its internal personnel.

During interconnection negotiations, and during the arbitration, Rhythms asked SBC to provide it with access to databases such as LFACS and LEAD electronically through a mediated gateway.[94] As discussed more fully below, SWBT refused Rhythms' request. Thus, Rhythms must attempt to obtain loop make-up information through a manual inquiry process. However,

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[87] Lopez-Baros Aff/Attachment 1 ¶ 9; *See BA-NY 271 Order* ¶ 143.

[88] *UNE Remand Order* ¶ 428; *Texas Arbitration Award/Attachment 4* at 60-62.

[89] "LFACs" is the Loop Facilities Assignment Control System.

[90] "LEAD" is the system for Loop Engineering Assistant Data.

[91] "TIRKS" is the Trunk Information Record Keeping System.

[92] *Texas Arbitration Award/Attachment 4* at 60.

[93] *Texas Arbitration Award/Attachment 4* at 61.

[94] *Texas Arbitration Award/Attachment 4* at 56-58.

the loop makeup information available to data CLECs through manual inquiry is significantly more limited than the information available to SBC personnel. SBC has identified eight pieces of loop make-up information available to CLECs through manual processes: 26-gauge equivalent loop length; actual length of the loop by gauge; quantity of bridged-taps, load coils and repeaters present on the loop; length of feed cable (F1) and the distribution cable (F2); existence of fiber in the loop; any disturbers currently present in the same and adjacent binder group(s); an indication whether a loop qualifies for the Power Spectral Density ("PSD") mask specified by a CLEC; and an order tracking number. In particular, through access to the LFACS, LEAD, and TIRKS databases, SWBT personnel are able to obtain an inventory of loop make-up information for every loop in Texas,[95] including at a minimum the following information that is not provided to CLECs even through a manual process: location and type of repeater, availability of spare loops for line and station transfers ("LSI") and the number of lines in use at a customer location.[96] Such loop make-up data is necessary to determine how best to provision xDSL service to the end-user. Without data on availability of spare loops for LSIs, Rhythms may be unable to determine whether DSL services can be provided to a particular customer.

Additionally, in its Plan of Record describing its present and future methods of operation for pre-ordering and ordering xDSL loops, SBC indicated that the following information *is* available to personnel in its 13-state region, but *will not be available* to CLECs in the future: presence of repeaters,[97] location of cable plant [aerial, buried, underground], [98] capacitance,[99]

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[95] Texas Arbitration, ACI Exh. 149, Bird Transcript at 45-46, 60-62. (SWBT personnel have access to databases that have an inventory of every loop in Texas through a workstation and SWBT personnel can write an inquiry to search for and access such information according to any criterion.)

[96] Lopez-Baros Aff/Attachment 1 ¶ 19.

[97] Chapman Affidavit at Attachment E (SBC POR) at 5 (presence of repeaters available in Pacific Bell region currently), at 13-14 (presence of repeaters not listed as information available in future).

type of load coil, [100] number of points of loading,[101] quantity of bridged taps,[102] and quantity of repeaters.[103] Clearly, the SBC databases contain the identified loop make-up data. In order to meet the nondiscrimination requirement of § 271, SBC must either make this loop make-up data available to CLECs, or somehow mask this data from *all* its own personnel. Thus, the perverse result of this Commission's access requirements appears to be that despite the fact that the database contain relevant, useful data, SBC refuses to make this data available to CLECs. Alternatively, the POR contemplates blatant discriminatory access in contravention of the requirements of § 271's checklist item 2.

B. SBC Does Not Provide CLECs With Same Electronic Access to Databases as Internal Personnel

The FCC has ordered that "to the extent that [ILEC] employees have access to the [loop qualification] information in an electronic format, that same format should be made available to new entrants via an electronic interface."[104] The Arbitrators in Texas found that SWBT's outside plant engineers and loop assignment center personnel have direct electronic access to LFACS and LEAD databases,[105] and ordered SWBT to provide Rhythms and Covad with electronic

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[98] Chapman Affidavit at Attachment E (SBC POR) at 7 (location of plant available in Ameritech region currently), at 13-14 (location of plant not listed as information available in future).

[99] Chapman Affidavit at Attachment E (SBC POR) at 7 (capacitance available in Ameritech region currently), at 13-14 (capacitance not listed as information available in future).

[100] Chapman Affidavit at Attachment E (SBC POR) at 7 (type of load coil available in Ameritech region currently), at 13-14 (type of load coil not listed as information available in future).

[101] Chapman Affidavit at Attachment E (SBC POR) at 7 (number of points of loading available in Ameritech region currently), at 13-14 (number of points of loading not listed as information available in future).

[102] Chapman Affidavit at Attachment E (SBC POR) at 9 (quantity of bridged taps available in SNET region currently), at 13-14 (quantity of bridged taps not listed as information available in future).

[103] Chapman Affidavit at Attachment E (SBC POR) at 9 (quantity of repeaters available in SNET region currently), at 13-14 (quantity of repeaters not listed as information available in future).

[104] *UNE Remand Order* ¶ 429

[105] *Texas Arbitration Award/Attachment 4* at 61, citing deposition of Victoria Bird, who testified that SWBT personnel can access LFACS and LEAD databases via a workstation.

access to all such internal information and records.[106] Accordingly, to demonstrate that it has met its checklist obligations, SWBT must prove that Rhythms and Covad have the same electronic access to loop make-up information in SWBT's databases as any SBC employee.[107] SBC fails to meet Checklist Item 2 because it does not provide CLECs with direct electronic access to loop make-up information during the pre-ordering stage available in internal databases, such as LFACS and LEAD. Rather, SBC has committed only to provide mechanized access indirectly through gateways and interfaces, which will not sufficiently support CLEC needs.

SWBT's internal operations have access to an integrated ordering system that is not available to CLECs. In its application, SBC describes a system known as Complex Service Order Systems ("CPSOS") as a system through which its own operations obtain pre-qualification information.[108] However, evidence in the arbitration shows that CPSOS is actually an integrated service negotiation system that will support a pre-order assembly functionality that allows a mechanized flow of *retail orders* into SWBT's ordering system.[109] This integrated system was planned to be based on an enhanced version of CPSOS system (Release 2.0) that SWBT was to roll out to its retail ADSL operations in August, 1999. Release 2.0 of CPSOS would provide SWBT"s internal operations with a single unified ordering system from prequalification to order processing.[110]

SWBT will not provide data CLECs with a similar capability. There will be no analog to CPSOS for Verigate/DataGate, the interfaces used by facilities-based CLECs such as Rhythms

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[106] *Texas Arbitration Award/Attachment 4* at 62.

[107] *UNE Remand Order* ¶ 430.

[108] Chapman Affidavit ¶ 10.

[109] Texas Arbitration, ACI Exh. 149, Phillips Transcript at 71-78 ("Phillips Tr/Attachment 15") (appended as Attachment 15).

[110] Texas Arbitration, ACI Exh. 149, Phillips Tr/Attachment 13 at 71-78.

for pre-ordering xDSL loops.[111] Thus, even after loop qualification becomes mechanized, CLECs will still have to take extra steps to have their orders processed. SWBT could provide CPSOS enhancements for Verigate/DataGate to create a single, seamless utility that would handle a CLEC order electronically all the way from loop prequalification to loop qualification. SWBT's unwillingness to do so is yet another example of SWBT's that SWBT has not provided non-discriminatory access to network elements, or provided capabilities at parity with its own operations.[112]

1. SBC Has Not Committed to Enhance Interfaces For Mechanized Pre-ordering and Ordering

SBC lists four interfaces or gateways that it currently offers facilities-based CLECs for pre-ordering and ordering xDSL-capable loops.[113] These interfaces and gateways provide some ability for CLECs to enter orders electronically, however, the interfaces will not sufficiently support CLECs' needs in the future for several reasons. First, SBC has refused to commit to support or enhance some of these interfaces in the future; Second, SBC will not make all interfaces uniform across its 13 state region; Third, future enhancements promised by SBC will leave some functions that require manual processing; and Finally SBC's own operations will have a level of integration and mechanization that is not available to CLECs.

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[111] Texas Arbitration, ACI Exh. 149, Talbot Transcript at 71-73 (appended as Attachment 16).

[112] It should be noted that Rhythms has concerns about the adequacy of SWBT's maintenance and repair systems. However, these systems were not given a thorough examination in the Rhythms/Covad arbitration or the Texas § 271 proceeding because neither CLEC had gotten far enough in the ordering process to have any experience with maintenance or repair issues.

[113] *SBC 271 Application* at 82. SBC also offers Easy Access Sales Environment ("EASE"), an integrated pre-ordering and ordering system for resale only. *Id.* Affidavit of Elizabeth A. Ham in support of SBC's 271 Application ("Ham Affidavit") ¶¶ 53, 55, 87. EASE is not useful to xDSL providers, as they are facilities-based carriers.

a. DataGate and EDI

DataGate is an application-to-application interface for obtaining loop make-up information during pre-ordering.[114] EDI is a standard data exchange protocol used for electronic exchange of information.[115] Both DataGate and EDI require a CLEC to create its own user interface in order to utilize their capabilities.[116] Because of the customized programming required, DataGate and EDI are typically used by only the largest telecommunications carriers in the country. Rhythms does not currently use DataGate or EDI.[117]

SWBT is required by the Texas Arbitration Award to enhance EDI/DataGate to provide: 1) real-time electronic access loop makeup information through SBC's pre-ordering process and 2) a mechanized flow-through ordering system for xDSL capable loops at parity with SWBT's internal or affiliate xDSL operations.[118]

Further, SBC has not addressed at all how it will provide access to LFACS and LEAD to CLECs consistent with the FCC's requirements. SBC does not indicate in its § 271 application whether its DataGate or EDI interface are adequate or even suitable to support LFACS and LEAD access. Since SWBT's own internal personnel currently have direct access to LFACS and LEAD,[119] SBC should be required to make such access available to Rhythms, Covad and all CLECs before SBC's OSS can be judged as adequate to support competitors or to meet the nondiscriminatory requirement of checklist item 2.

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[114] Texas Arbitration Award at 82; Ham Affidavit ¶ 60.

[115] Texas Arbitration Award at 82.

[116] Texas Arbitration Award at 82-83; Ham Affidavit ¶ 60.

[117] Lopez-Baros Aff/Attachment 1 ¶ 9.

[118] Texas Arbitration Award at 62-63.

[119] Texas Arbitration Award at 61.

b. Toolbar (Verigate and LEX)

Toolbar is a graphical user interface ("GUI") operating on Windows that contains both Verigate, a GUI through which CLECs may place pre-ordering requests and Local Service Request Exchange ("LEX"), a GUI through which CLECs may place orders. Verigate and LEX were created by SWBT for use as an "off-the-shelf" interfaces by smaller carriers. These GUIs are currently available and in use by Rhythms and many other CLECs, but there are serious questions whether the GUIs will be available and/or be capable of supporting the pre-ordering and ordering needs of CLECs.[120] Verigate and LEX are critical to CLECs because without them, CLECs will be forced to expend limited resources and time to develop their own GUIs.[121] Currently, Rhythms obtains pre-ordering information through Verigate, and Rhythms and other CLECs use LEX to order DSL-capable unbundled loops.[122] Rhythms, like many other CLECs are developing integrated EDI systems, to replace these GUIs.[123] Until Rhythms' EDI is in place, Rhythms will still need access to either Verigate or LEX for pre-ordering functions.[124] Therefore, Rhythms has asked SWBT to commit to continued to support, and to enhancement Verigate and LEX in the same manner as EDI and DataGate will be enhanced.[125] To date, SWBT has not committed to do so.[126]

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[120] Lopez-Baros Aff/Attachment 1 ¶ 19.

[121] Lopez-Baros Aff/Attachment 1 ¶ 9; Ham Affidavit ¶ 48-49.

[122] Lopez-Baros Aff/Attachment 1 ¶ 9.

[123] *SBC 271 Application* at 83.

[124] Lopez-Baros Aff/Attachment 1 ¶ 8.

[125] Lopez-Baros Aff/Attachment 1 ¶ 10.

[126] SWBT maintains that under Appendix C ¶ 15 of the Merger Conditions it has no obligation to enhance Verigate or LEX. January 6 Comments/Attachment 6 at 6-7.

c. SWBT Has Not Demonstrated that Verigate Will Fully Support CLEC Needs

SWBT has refused to commit to making modifications similar to those for EDI and DataGate so that Verigate will support real-time mechanized loop pre-ordering.[127] SWBT filed a written opposition to modifying Verigate or LEX as part of a petition for rehearing at the Texas Commission,[128] and opposed Rhythms' contract language because such changes were not expressly ordered by the Arbitrators. "SWBT objects to the number of systems which require Texas-style enhancements."[129] Further, SWBT makes no reference to Verigate enhancements or use in the Future Methods of Operation ("FMO") section of its Plan of Record ("POR"),[130] which describes SBC's current and future methods of operation for its OSS in the 13-state region. Thus, SWBT appears unwilling to support any enhancements to Verigate that would ensure *all* CLECs have access to a mechanized pre-ordering system into the future.

SWBT's opposition to updating its "off-the-shelf" pre-ordering and ordering interfaces is anticompetitive and is inconsistent with the Arbitrators' holding and the FCC's *UNE Remand Order*, which require[s] SWBT to upgrade all of its OSS for use by competitors at parity with SWBT's own use.[131] If SWBT discontinues support for Verigate, smaller CLECs like Rhythms and other DSL providers will be particularly disadvantaged. CLECs will be forced to spend substantial time and resources to develop their own GUI that can be used to access SBC's

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[127] Southwestern Bell Telephone Company's Explanation of Submitted Proposed Language (Jan. 5, 2000) ("Explanation of Submitted Language/Attachment 17") (appended as Attachment 17) at 6.

[128] January 6 Comments/Attachment 7 at 6-7; Dec. Request for Rehearing/Attachment 7.

[129] Explanation of Submitted Language/Attachment 17 at 6.

[130] *See* Chapman Affidavit at Attachment E at 13-15. Pursuant to ¶ 15(c)(1) of the Merger Order, SBC was obligated to file a publicly available Plan of Record consisting of an overall assessment of SBC's and Ameritech's existing DataGate and EDI interfaces, business processes and rules, hardware capabilities, data capabilities and differences and SBC/Ameritech's plan for developing and developing enhancements to the existing DataGate or EDI interfaces for pre-ordering and ordering xDSL. *Id.*

[131] *UNE Remand Order* ¶¶ 428-429; Texas Arbitration Award at 62.

ordering interfaces. Even if SBC continues to leave Verigate in place, but not enhance it for mechanized pre-ordering functions, CLECs will be seriously harmed because they will be denied access to crucial pre-ordering information that is necessary for scaleable entry into the Texas market.

If Verigate is not enhanced, it may become unusable for CLEC pre-ordering functions. For example, without an enhancement, it is not clear whether CLECs will be able to obtain through Verigate the soon-to-be mandatory[132] tracking number issued by SWBT's OSS during loop qualification. [133] If SWBT is able to restrict CLECs to using only DataGate and EDI, SWBT will have successfully imposed a substantial development burden on CLECs, which are typically start-up companies with limited resources. Such an approach undermines the efforts by this Commission to ensure that competitors have a fair chance to compete with SWBT's own internal operations.

2. Local Service Request Exchange ("LEX") May Not Fully Support CLEC Needs

LEX is a GUI developed by SWBT that is launched from the Toolbar platform. LEX operates with Windows and is intended to allow CLECs to electronically create and transmit local service requests ("LSRs") to SWBT.[134] LEX is also intended to allow CLECs to receive acknowledgements and notification of order errors, and to track Firm Order Confirmations ("FOCs"). However, Rhythms has encountered numerous serious problems with LEX. These

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[132] Accessible Letter, xDSL Capable Loops: Current Loop Qualification and Order Processes – Arkansas, Kansas, Missouri, Oklahoma, Texas," January 4, 2000, Number CLEC00-003 ("xDSL Accessible Letter/Attachment 18") (appended as Attachment 18) at 2. The letter states that the tracking number "*must* be referenced if an order is placed."

[133] Lopez-Baros Aff/Attachment 1 ¶ 10 For an explanation of the use of tracking codes, see Chapman Affidavit at Appendix A at 15.

[134] Ham Affidavit ¶ 89.

problems, discussed below, raises serious doubts about whether LEX is, or can ever be, sufficient to meet CLEC needs.

Rhythms began using LEX soon after it became available for ordering DSL-capable loops in late fall of 1999.[135] Rhythms immediately encountered difficulties in using the interface, however, because of the lack of established protocols for ordering DSL-capable loops.[136] In several cases, even the customer service representatives at SWBT were unable to keep up with the constantly evolving codes that are necessary to order DSL-capable loops.[137] This confusion was compounded by the lack of adequate training and documentation.[138] Rhythms sent its employees to the SWBT "train the trainer" classes and workshops, but even after training was completed, Rhythms continued to have problems entering orders through LEX.[139] These ordering problems are caused, at least in part, because SWBT's training courses do not provide all of the information necessary for ordering loops.[140] As a result, Rhythms has been forced to order loops through trial and error and based on information received incrementally in repeated meetings with SWBT personnel.[141] To date, approximately 80 percent of the orders submitted by Rhythms' for DSL-capable loops have been rejected by SWBT.[142] In many cases Rhythms found that an order that was accepted by one SWBT service representative

[135] Lopez-Baros Aff/Attachment 1 ¶ 12.

[136] Lopez-Baros Aff/Attachment 1 ¶ 12.

[137] Lopez-Baros Aff/Attachment 1 ¶ 12.

[138] Lopez-Baros Aff/Attachment 1 ¶ 12.

[139] Lopez-Baros Aff/Attachment 1 ¶ 12.

[140] Lopez-Baros Aff/Attachment 1 ¶ 12.

[141] Lopez-Baros Aff/Attachment 1 ¶ 12.

[142] Lopez-Baros Aff/Attachment 1 ¶ 12.

was identical to an order that was rejected by another service representative.[143] In most cases the issue had to be escalated to have the orders processed with some consistency.[144]

Due to the many problems with LEX, Rhythms currently submits most of its orders for DSL-capable loops in Texas via facsimile.[145] Thus, Rhythms derives little advantage from using LEX.[146]

3. SBC's OSS for Data CLECS Will Require Manual Processing

Despite the availability of electronic interfaces and gateways described above to initiate pre-ordering and ordering, CLEC loop qualification and order entry processes are and will remain manual for the foreseeable future. Manual processes are totally inadequate to support either pre-order access to loop make-up information or ordering of DSL loops.

This Commission has consistently indicated that relegating CLECs to manual processes contravenes their right of nondiscriminatory access to OSS and indeed jeopardizes § 271 compliance.[147]

> It is virtually impossible for orders that are processed manually to be completed in the same amount of time as orders that flow through electronically . . . [Moreover,] excessive reliance on manual processing, especially for routine transactions, impedes the BOC's ability to provide equivalent access to these fundamental operations supports systems.[148]

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[143] Lopez-Baros Aff/Attachment 1 ¶ 12.

[144] Lopez-Baros Aff/Attachment 1 ¶ 12.

[145] Lopez-Baros Aff/Attachment 1 ¶ 11.

[146] Lopez-Baros Aff/Attachment 1 ¶ 11.

[147] "We agree with the Department of Justice that "'manual processing that results in the practicable unavailability of services or elements at foreseeable demand levels can impede the development of competition, and thus obviously has a direct bearing on compliance with the competitive checklist and the Commission's rules.'" *Ameritech Michigan 271 Order* ¶ 180 (*quoting In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, Evaluation of the United States Department of Justice, CC Docket No. 97-137, FCC 97-298 (filed June 25, 1997) at Appendix A at 2-3).

[148] *First Louisiana 271 Order* ¶ 25; *see also Ameritech Michigan 271 Order* ¶ 178.

Moreover, the Commission has recognized the importance of electronic access in the context of loop make-up information. "An incumbent does not meet the nondiscrimination requirement if it has the capability electronically to identify xDSL-capable loops either on an individual basis or for an entire central office, while competing providers are relegated to a slower and more cumbersome process to obtain that information."[149]

C. Manual Access to Loop Make-up Data Is Not At Parity With SBC's Retail Operations

SBC has refused to provide pre-order electronic access to loop make-up information Thus, whether a loop make-up request is submitted manually via fax or electronically through email, the loop make-up process itself is manual.[150] A loop make-up request is sent to the Local Service Center ("LSC"), where SWBT personnel complete a loop make-up request form and forward it to an outside plant engineer. [151] The form is completed and sent back to the LSC, which forwards it to the CLEC.[152] Thus, although loop make-up is electronic for SBC's retail DSL orders, CLECs must continue using a cumbersome, non-mechanized system for at least another year. Such manual — and discriminatory — processes do not meet § 271.[153]

D. Manual Ordering For DSL Loops is Not at Parity with SBC's Retail Operations

SBC claims that the "vast majority" of CLEC orders entered via an electronic OSS flow through.[154] This claim is misleading for several reasons. First, SBC uses a different definition for "flow through" than commonly used in the industry and by the Commission. SBC defines

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[149] *Advanced Services Order* ¶ 56.

[150] xDSL Accessible Letter/Attachment 18 at 1.

[151] xDSL Accessible Letter/Attachment 18 at 1.

[152] Chapman Affidavit ¶ 26-27.

[153] *Ameritech Michigan 271 Order* ¶ 180.

[154] *SBC 271 Application* at 88.

"flow through" as a process in which a CLEC places an order and is not involved again.[155] However, the Commission and the industry use the term to mean an order is placed electronically through a gateway and the order moves through a carrier's back office systems without additional human intervention.[156] Thus, SBC's claim that the "vast majority" of CLEC orders flow through must be evaluated in light of SBC's self-serving and misleading definition of flow-through.

Second, SBC's loop ordering process for DSL loops are manual.[157] Even if Rhythms submits local service requests ("LSRs") electronically in LEX, LSRs for DSL-capable loops immediately fall out for manual processing by the same organization at SWBT that handles orders sent by facsimile.[158] Thus, contrary to SWBT's representation that "the vast majority of CLEC orders entered via electronic OSS interfaces 'flow through' SWBT's systems without manual intervention, on a nondiscriminatory basis,"[159] all of the DSL orders submitted by Rhythms via SWBT's electronic interfaces have required manual intervention.[160] In contrast, DSL orders for SBC retail operations are processed electronically without manual intervention.

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[155] Chapman Affidavit 3 ¶ 39, n.16.

[156] *In the Matter of Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, Notice of Proposed Rulemaking, CC Docket No. 98-56, FCC 98-72, 13 FCC 12817, 12849 ¶ 71 (1998) ("*Performance Measurements NPRM*").

[157] Chapman Affidavit ¶¶ 26-32; Chapman Affidavit Attachment E (SBC POR) at 3; Lopez-Baros Aff/Attachment 1 ¶ 13 .

[158] Lopez-Baros Aff/Attachment 1 ¶ 11.

[159] *SBC 271 Application* at 88.

[160] In the Chapman Affidavit, SWBT suggests that "flow through" does not indicate that the order is processed entirely with mechanical systems, but rather that it is processed without any further CLEC involvement. Chapman Affidavit at 25 n.16.

1. SWBT's Claims Regarding Response Times for Ordering Exclude xDSL Services

a. FOCs For xDSL Are Not Returned on a Real-time Basis As SBC Claims

SBC claims that it returns Firm Order Confirmations ("FOCs") on a real-time basis,[161] and relying on Telcordia testing, asserts that FOCs were returned on average in 19.8 minutes.[162] However, for xDSL loop orders, the FOC interval is much, much longer.[163] In numerous cases, Rhythms has submitted complete and accurate LSRs, but has not received a FOC for several days.[164] Moreover, as acknowledged by SWBT,[165] it measures the performance of its interfaces only for those orders that it deems to be fully complete and accurate. If SWBT rejects an order, it restarts the clock for the intervals for providing a FOC and the loop itself, no matter the cause of the rejection.[166] As a result, SWBT's performance statistics dramatically understate the interval between the first submission of an order and the return of a FOC and the provisioning of the requested loop, which is critical to a CLEC's ability to compete.

b. SBC's System for Providing Order Rejections for xDSL Loops is Discriminatory

SBC claims that it is providing CLECs "with mechanized rejection notices within one hour 100 percent of the time over LEX and more than 99 percent of the time over EDI."[167] Based on Rhythms' experience with loop orders placed via LEX, this is a gross exaggeration. On average, Rhythms has received rejection notifications for orders submitted manually (*i.e.*, by

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[161] *SBC 271 Application* at 88.

[162] *SBC 271 Application* at 88.

[163] The quickest SWBT has returned FOCs to Rhythms is the next day for an IDSL loop, which does not go through the pre-qualification process. Lopez-Baros Aff/Attachment 1 ¶ 18.

[164] Lopez-Baros Aff/Attachment 1 ¶ 18.

[165] *SBC 271 Application* at 88.

[166] Lopez-Baros Aff/Attachment 1 ¶ 18.

facsimile) in approximately two days, and rejection notifications for orders submitted via LEX is generally five to seven days for orders that require loop qualification, and three to five days for loops that do not require loop qualification.[168] SBC has failed to provide any independently verified data on the quantity or timelines of order rejections for its retail operations.

(i) Rejection Notifications are Unreliable and Inconsistent

In addition rejection notices provided by LEX have been unreliable and inconsistent. If LEX finds a data entry error (*e.g.*, wrong number of characters in a particular field), it will provide a nearly instantaneous rejection notification via Toolbar.[169] However, any rejections occuring later than this initial screening process are not instantaneous and may or may not be mechanized.[170] For example, rejection notifications in the manual processing phase sometimes are received within a few hours and sometimes several days after the order is submitted. [171] Moreover, notifications are often plagued with problems.[172] Before Rhythms adopted one centralized telephone number for facsimile notifications, SWBT repeatedly sent rejection notifications to the wrong telephone number. [173] In addition, on a number of occasions Rhythms received errant rejection notifications or FOCs that were intended for other CLECs and has even received rejection notifications after already receiving a FOC for the order. [174] Because these notifications are so unreliable, Rhythms has instituted a standing internal policy of contacting SWBT's Local Service Center ("LSC") by telephone three days after submitting an order if we

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[167] *SBC 271 Application* at 89.

[168] Lopez-Baros Aff/Attachment 1 ¶ 14.

[169] Lopez-Baros Aff/Attachment 1 ¶ 14.

[170] Lopez-Baros Aff/Attachment 1 ¶ 14.

[171] Lopez-Baros Aff/Attachment 1 ¶ 14.

[172] Lopez-Baros Aff/Attachment 1 ¶ 15.

[173] Lopez-Baros Aff/Attachment 1 ¶ 15.

[174] Lopez-Baros Aff/Attachment 1 ¶ 15.

have not yet received a rejection notification or FOC from SWBT. [175] Absent this policy, SWBT's rejection notification delays would likely be much longer. [176]

When Rhythms receives a rejection notification, it must correct the error and supplement the order.[177] Obviously, such rejections delay the provision of service to Rhythms' customers. This delay is compounded by the fact that SWBT frequently rejects the same order more than once, because SWBT does not completely review the initial order when the order is resubmitted. SWBT will identify additional errors that were not previously identified, each time requiring Rhythms to supplement the order and delaying the end user's installation date.[178] It is not uncommon for Rhythms to have to supplement an order three or four times before it is successfully processed.[179]

(ii) SBC Rejects Loop Orders For Improper Reasons

In addition to data entry errors, SWBT will also reject an order for a loop that does not meet SWBT's parameters for that loop type.[180] For instance, SWBT will reject an order for an ADSL-capable loop if the loop falls outside the parameters for ADSL, as specified by SWBT,[181] even thought the loop meets industry and Rhythms' standards. Based on a partial review of the orders submitted by Rhythms, it appears that approximately 10 percent of the orders submitted to SWBT are being rejected because they do not meet SWBT's loop parameters. [182] Rhythms'

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[175] Lopez-Baros Aff/Attachment 1 ¶ 14.

[176] Lopez-Baros Aff/Attachment 1 ¶ 14.

[177] Lopez-Baros Aff/Attachment 1 ¶ 16.

[178] Lopez-Baros Aff/Attachment 1 ¶ 16.

[179] Lopez-Baros Aff/Attachment 1 ¶ 16.

[180] Although SWBT was ordered in the arbitration with Rhythms and Covad to provide a single two-wire xDSL loop, Arbitration at 11, SWBT currently requires CLECs to order loops that correspond to particular flavors of DSL.

[181] Lopez-Baros Aff/Attachment 1 ¶ 17.

[182] Lopez-Baros Aff/Attachment 1 ¶ 17.

experience is consistent with testing of SWBT's OSS by Telcordia, wherein about one-third of the loop orders were rejected for improper reasons such as loop length or speed.[183]

Specifically, if the requested loop is longer than 17,500 feet, SWBT will reject the order and Rhythms must supplement the order as a request for an IDSL loop, or unqualified ADSL loop length. [184] Similarly, SWBT will reject an order for an SDSL-capable loop if the loop is greater than 7,000 feet, which is significantly shorter than the maximum length length on which Rhythms provides SDSL services. [185] Again, Rhythms must supplement the order for an unqualified loop. SWBT will also reject an order if it believes that line conditioning is required to provision DSL services on the loop. [186] Rhythms must then supplement the order and specify that the conditioning be completed. Until recently, such orders would be cancelled, and Rhythms would be required to submit a new order. [187]

2. OSS Testing Was Deficient

SBC's application does not provide sufficient support for its assertion that it provides nondiscriminatory access to its OSS for pre-ordering, ordering and provisioning of xDSL-capable loops. Rather than waiting until it could verify the capabilities of its OSS for CLEC xDSL orders in commercial volumes, SBC relied on so-called "test case" orders.[188] The SBC tests were inadequate because the number of orders processed was too low to draw any statistically significant conclusions about the performance of SBC's OSS in real world conditions, and the testing was done by an entity associated with SBC.

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[183] Telcordia Report § 4.4.1.5.3 at 77-78.

[184] Lopez-Baros Aff/Attachment 1 ¶ 17.

[185] Lopez-Baros Aff/Attachment 1 ¶ 17.

[186] Lopez-Baros Aff/Attachment 1 ¶ 17.

[187] Lopez-Baros Aff/Attachment 1 ¶ 17.

[188] *SBC 271 Application* at 39-40.

a. Testing of Only Nine xDSL-Capable Loop Orders Is Seriously Deficient

Telcordia, formerly known as BellCore, tested only nine LSRs for ADSL-capable loops.[189] Further, these nine orders provide absolutely no insight into the adequacy of the mechanized pre-ordering and ordering systems SBC has been ordered to provide by the FCC and Texas PUC because all nine orders were placed manually.[190]

In addition, Telcordia attempted to test orders for SDSL by analyzing seven orders for ISDN loops, which could be used to provide SDSL.[191] It is doubtful whether these ISDN orders provide any useful data regarding ordering of xDSL loops. ISDN can be provided over loops that have Digital Loop Carrier ("DLC") and repeaters. Therefore, ISDN loops do not require the same loop qualification as most xDSL services[192] provisioned over the copper facilities in SWBT network. Therefore, orders placed for ISDN loops would not serve as an adequate proxy for the pre-ordering and ordering processes required for most xDSL-capable loops provisioned by SWBT.

SBC's extremely small sample size is completely inadequate to reach statistically significant determinations about the ability of SBC's OSS to support commercial volumes of xDSL-capable loop orders. Even SBC's own witness admits that testing was inadequate. "Because the actual number of CLEC orders during the testing period was small, however, Telcordia had insufficient data to draw statistically significant conclusions about SWBT's

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[189] Public Utility Commission of Texas Southwestern Bell Readiness Report § 4.1.1.5.2 ("Telcordia Report") at 77.

[190] Telcordia Report § 4.4.1.2 and § 4.4.1.3 at 76 and § 4.4.1.5.1 at 77.

[191] Telcordia Report § 4.4.1.5.2 at 77; Section 4.4.2.4.3 at 79.

[192] Chapman Affidavit ¶ 17 at 9.